18046

IN THE
Supreme Court of United States.

SELDEN AND OTHERS

vs.

THE BOARD OF STATE CANVASSERS, &c.

On Appeal from Circuit Court of United States for Eastern District of Virginia.

No. 190.

JONES AND OTHERS

vs.

THE BOARD OF STATE CANVASSERS, &c.

In Error to Circuit Court of United States for Eastern District of Virginia.

No. 189.

REPLY BRIEF FOR APPELLEES AND DEFENDANTS IN ERROR.

When we filed our former brief none had been filed for the appellants and plaintiffs in error, and we therefore had no opportunity of commenting upon some of the positions taken in the brief that has since been filed by Mr. Wise. We therefore now ask that we may file this brief for the purpose of commenting on some of the points and authorities relied on in Mr. Wise's brief.

In the first place, on the subject of jurisdiction, Mr. Wise undertakes to quote section 629, clause 12, of the United States Revised Statutes, but in doing so leaves out material words, which entirely changes the meaning of the statute, as will appear by the following comparison:

Clause 12th, as printed in Revised Statutes:	Clause 12th, as quoted by Mr. Wise:
"Twelfth. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several States."	"Twelfth. Of all suits brought by any person * * * to enforce the right of citizens of the United States to vote in the several States." * * * * * * *

This clause is intended to give jurisdiction of suits brought for damages suffered by any person in executing the laws of the United States of the character mentioned, but not of suits to enforce the right to vote, as seems to be supposed by the learned counsel on the other side. This construction will be plain, as we said in our former brief, if reference is had to the statutes from which the language is brought forward into clause 12th.

Even read as quoted by the learned counsel, it would not support this suit, for this cannot be said to be a suit to enforce the right to vote, except in the most remote way, viz., by clogging the wheels of government under existing legislation until some other system has been adopted.

In addition to what we said in relation to section 629, clause 16, and section 1979, of the Revised Statutes, in our former brief, we will say that neither of those statutes is applicable to

the cases at bar, for the reason that none of the defendants have "subjected any citizen to the deprivation" of any rights, privileges, or immunities, as specified in 1979, nor would either the suits at bar "redress the deprivation" of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law providing for the equal right of citizens of the United States, &c. No relief given in these suits would redress the deprivation of any right, privilege, or immunity whatever.

These statutes were enacted, as this Court has said, in *Holt* vs. *Indiana Manufacturing Co.*, 176 U. S., 68, for the protection of civil rights alone, which opposing counsel seems to confound with mere political rights, such as are involved in the cases at bar. Civil rights within the meaning of the said statutes are those mentioned in Revised Statutes, sections 1977 and 1978, which citizens have, whether they are entitled to the elective franchise or not. But these rights are entirely different from political rights, which belong to those persons only upon whom the State sees fit to confer them.

THE SUITS ARE AGAINST THE STATE, AND BOTH SEEK RELIEF CONCERNING POLITICAL RIGHTS.

Opposing counsel claims that these proceedings are not against the State of Virginia, and that they are within the authority of decisions of this Court, in which it has been held that the Circuit Courts of the United States may entertain suits to enjoin the officers of a State from the performance of some act which constitutes a trespass or positive wrong to the plaintiffs, or to compel the performance of some definite and specific duty to which the plaintiff is entitled. It is evident, however, that that line of cases is entirely unlike those at bar, and that the cases at bar fall within the scope of cases, such as *Ex parte* Ayers, 123 U. S., 443, and *Fitts* vs. *McGhee*, 172 U. S., 516.

In the cases at bar, all that the defendants proposed to do, or could do, was to make a declaration, or to deliver a certificate of election. If the returns were void, it is manifest that the

declaration of the defendants of the result of those returns and the delivery of the certificate of election would also be void; and even if this were not so, certainly the mere declaration of a result or the delivery of a certificate of election does not constitute a trespass or wrong to the plaintiffs for which they could maintain an action for damages after the acts were done.

This distinguishes these cases from the case of *Osborn* vs. *Bank*, and the long line of cases which have followed the decision in that case.

The acts complained of have now been done by the Board of Canvassers and the Secretary of the Commonwealth, and yet we respectfully submit that it would surpass the ingenuity of the counsel of the complainants to frame an action at law in behalf of the plaintiffs against the defendants in these cases to recover damages for those acts.

It is manifest that these suits were not brought for the purpose of preventing tortious or wrongful acts, as in *Osborn* vs. *The Bank*, and other cases of that class, but were brought by the plaintiffs for the purpose of supervising, controlling, and directing State officers in the discharge of political duties, and as incidental thereto to have the Court declare the abstract propositions that the Constitution of Virginia and the ordinance of registration are void.

The effect of such a decision would not be to redress the wrongs complained of by the plaintiffs, but to stop the wheels of government so far as the election of representatives in Congress is concerned, by preventing all future elections under the existing law; and thus, by a kind of compulsion, to force the State to adopt some other system for the election of members of the House of Representatives.

As was said by Mr. Justice Harlan in delivering the opinion of this court in *Fitts* vs. *McGhee*, 172 U. S., none of the defendants in this case was charged with the duty of carrying out the provisions of the Constitution and ordinance of registration complained of. The duties of the defendants in these cases was to execute a law which had been upon the statute books for a number of years before the adoption of the new Constitution.

and the validity and constitutionality of that law are in no way impugned by the plaintiffs. And the only way in which the laws which are complained of enter into the office of the defendants is, that the defendants canvass returns made at the prior election, declare their result, and one of the defendants delivers certificates of election in accordance with such declaration. And because the defendants are in this remots way connected with the prior steps in the election proceedings, the plaintiffs seek by a decree against them (who are not carrying out or enforcing the particular laws complained of) to have the constitutionality of those laws determined.

What was said by Mr. Justice Harlan, delivering this Court's opinion in the case of *Fitts* vs. *McGhee*, 172 U. S., 530, can be more strongly said in these cases:

"That would be a very convenient way for obtaining the speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons."

We, therefore, respectfully insist, that upon the principles settled in *Cunningham* vs. *Railroad Co.*, 109 U. S., 446; *Ex parte* Ayers, 123 U. S., 443, and *Fitts* vs. *McGhee*, 172 U. S., 516, these cases are against the State of Virginia, and on that account cannot be maintained.

What we have already said demonstrates that the relief sought in both cases is political. The fact that, if the acts of the defendants sought to be prohibited are performed, they furnish no ground of action for damages against the defendants, as would be the case if the defendants committed a trespass or positive wrong upon the plaintiffs, makes it manifest that the relief sought is purely political, for it is plain that if the plaintiffs had private and distinct rights, as to which they were seeking redress, any act in violation of those rights would give them a good cause of action for damages. If the relief sought in these cases were granted it would merely, so far as the relief relates to any definite acts of the defendants, have the effect of

preventing the operations of government, certainly so far as representation of the State of Virginia in the House of Representatives is concerned, the object of the plaintiffs being that by thus preventing representation, a compulsion will be brought to bear which will force a change of laws as to registration and the elective franchise. Such relief as this is plainly merely political.

If the Court were to grant such relief it would merely pull down one system without any ability to reinstate another. It would enjoin a branch of the executive and political departments from executing its duties, without being able to substitute any other system, or any other action in the place of that which it negatived and destroyed.

The learned counsel on the other side seems to think it anomalous that the courts should decline to enforce such relief entailing such consequences, but we confidently submit, not only that this Court has invariably declared that the courts were not competent to administer such relief, but that the learned counsel cannot produce a decision of any court of high repute, or any statute of the United States, that justifies the Court in entertaining such proceedings. Certainly none of the acts of Congress to which he refers lend the least color to supporting any such jurisdiction, notwithstanding the confidence with which he seems to rely upon them, and this Court has uniformly decided that there was no such jurisdiction.

It necessarily follows, from what we have said above, that in these cases neither a bill in equity nor a writ of prohibition will lie. It is unnecessary for us to add anything to what we have said in our former brief on the subject of the bill in equity.

On the prohibition proceeding we wish to make some additional comments in reply to what opposing counsel has said in his brief touching that proceeding.

PROHIBITION WILL NOT LIE IN THIS CASE BECAUSE—

(1) UNITED STATES CIRCUIT COURTS HAVE NO JURISDICTION OF PROHIBITION IN ORIGINAL PROCEEDINGS.

and

(2) BECAUSE THAT WRIT ONLY LIES BETWEEN COURTS.

(1) United States Circuit Courts have no jurisdiction to award a writ of prohibition, except in aid of a jurisdiction already acquired.

It cannot be necessary that we should add anything to the authorities cited in our former brief, which support this position beyond the reach of cavil.

This Court has announced, not once, but repeatedly, from the case of *McIntyre* vs. *Wood*, 7 Cranch, 504, up to *Smith* vs. *Bourbon Co.*, 127 U. S., 112, that the writ of mandamus (and the writ of prohibition stands upon exactly the same footing) can be issued by United States Circuit Courts only under section 716 of the Revised Statutes, embodying, with a slight change, section 14 of the Judiciary Act, and that the language of section 716, which gives the jurisdiction to issue such writs, limits and confines their use to cases where they are necessary in aid of a jurisdiction already acquired.

When the statutes which the learned counsel on the other side relies on as supporting the power of the Circuit Court to issue the writ as an original proceeding were passed, these decisions had been made, and even if those statutes were otherwise applicable to the enforcement of political rights, it is plain they would not be held, in the absence of express words, to change the well-settled construction which had been placed upon section 716 by the Supreme Court of the United States.

In this connection, we beg to call attention to an erroneous statement on page 81 of the brief, attributing to the Honorable Chief Justice, on the trial in the lower court, suggestions which we do not remember to have been made. We do not think the Honorable Chief Justice suggested that the 12th or 16th clause of section 629 had been repealed by the general act of August 13, 1888; on the contrary, it is our recollection that he assumed that those clauses were in force, but did not think them applicable to these cases; and certainly no such suggestion was made in relation to section 722 of the United States Revised Statutes. According to our very distinct recollection, that section was not referred to until after the argument in the lower

court was over, it being first referred to in the assignment of errors made by opposing counsel.

(2) In our former brief we cited authorities in support of the proposition that the writ of prohibition lies only between courts. Precedents in Virginia to this effect are many and uniform. See *Burch* vs. *Hardwicke*, 23 Grattan, 51, and a long line of cases cited in a note to *Hogan* vs. *Guigon*, 29 Grattan, 713.

The Supreme Court of the United States had occasion to pass upon the same question in *Smith* vs. *Whitney*, 116 U. S., 167, and held the same way, deciding that if the Supreme Court of the District of Columbia had jurisdiction to issue a writ of prohibition in any case it could not do so to prohibit the Secretary of Navy from ordering a court-martial. (116 U. S., 167, 176.) This Court said, on page 176:

"The object of a writ of prohibition is to prevent a court of peculiar, limited or inferior jurisdiction from assuming jurisdiction of a matter beyond its legal cognizance. It can only be issued to restrain the exercise of judicial functions. When the suit complained of is brought by a private person, he may be joined as a defendant. But when it is a suit or prosecution on behalf of the government, the writ of prohibition can go to the Court only.

"The Secretary of the Navy being an executive officer, and not a member of the court martial sought to be prohibited, it is quite clear that his acts concerning the petitioner cannot be the subject of a writ of prohibition. * * *

"A writ of prohibition is never to be issued unless it clearly appears that the inferior court is about to exceed its jurisdiction."

These decisions in Virginia and in the Supreme Court of the United States conclude the question as to the office of such a writ, even if other States, by reason of statutes or their practice, announced and adhered to a different rule. But in point of

fact, we believe the decisions are wellnigh unanimous to the same effect in other jurisdictions.

The learned opposing counsel cites some cases in respect to railway commissioners in England. If the statutes under which those commissioners act are examined, it will be seen that their duties are substantially the duties of a court; indeed, the jurisdiction was originally conferred upon the Court of Common Pleas by statute, and subsequently transferred to the body known as railway commissioners.

The learned opposing counsel cites the case of *Brazie* vs. *Fayette County Commissioners*, 25 West Va., 213, in support of his contention that a prohibition is not limited to a court. In that case, election commissioners were proceeding to examine witnesses and take evidence to show that the returns of election before them were not proper to be counted; and it was held that the sole duty of the commissioners of election was to count the returns sent to them, and not to take evidence and to decide which of those returns ought, or ought not, to be counted, and that therefore a prohibition was issued against their assuming judicial functions, when, in point of law, no such judicial functions were imposed upon the board. The prohibition was not to prevent their acting at all, but to prevent their acting in the character of a court when they had no jurisdiction so to act.

Whether this case be soundly decided or not, it does not concern us in this case; for if soundly decided, it in no way militates against our contention.

Opposing counsel also cites some cases from South Carolina, in which State the courts have gone further than in any other to sustain the writ of prohibition where the writ is not directed to what is strictly a court; but the Carolina court based its ruling upon the ground that the proceedings in the particular case were judicial in their nature; and it did not undertake to apply the writ except to a body exercising judicial functions.

The learned opposing counsel, on pages 83 to 87 of his brief, has cited from the American and English Encyclopedia of Law, volume 19 (old edition); from Spelling on Injunctions and other Extraordinary Remedies, and from High on Extraordi-

nary Legal Remedies, general expressions on the subject of the use of the writ of prohibition. We have attempted to verify these citations, but in nearly every instance have either been unable to find the language quoted at all, or have found that the language used by the author has, by some error, been so changed as to materially change the sense.

On page 84 of his brief, he quotes two paragraphs from volume 19 of the old edition of the American and English Encyclopedia of Law at page 275, which we have not been able to find in the precise form quoted.

On page 85 of his brief, he quotes 2nd Spelling on Injunctions and Other Extraordinary Remedies, section 1744; but the quotation stops in the middle of a sentence and materially changes the author's meeting.

Sentence as quoted in brief:	Sentence as it appears in Spelling:
"On a similar principle, such writ will lie from the judge to the county commissioners assembled in special session to ascertain the result of an election to prevent them from transcending their powers."	"On a similar principle, such writ will lie from the judge to the county commissioners assembled in special session to ascertain the result of an election to prevent them from transcending their powers by examining witnesses and hearing evidence to determine whether the precinct commissioners have returned votes which ought not to be counted."

This passage is taken from the case of *Brazie* vs. *Fayette County Commissioners*, 26 West Va., 213, in which the Court held that prohibition would lie to a board of county commissioners, although it was merely a ministerial body, if it undertook to exercise judicial powers. In other words, that prohibition would not only lie to a court to prevent it from exceeding

its jurisdiction, but would also lie to a ministerial body which undertook to act as a court without lawful power to do so.

On page 85, the brief undertakes to quote from section 1720 of 2nd Spelling, but the quotation is erroneous.

Passage as quoted in brief:

"It is no defence to the writ that the act sought to be prohibited is ministerial merely, if the party prohibited is part of the machinery of the obnoxious law and the instrument in the attempt to make its prohibitions effectual when it is void."

Passage as it appears in 2nd Spelling, Sec. 1720:

"In such case, it is no defence that the act sought to be prohibited is ministerial only, since the officer is part of the machinery of the court and its instrument in the attempt to enforce a judgment entered by it without jurisdiction."

In other words, this passage from Spelling announces the doctrine that while a ministerial act can generally not be the subject of a prohibition for lack of jurisdiction, if an execution has issued upon a judgment which is void, the execution may be prohibited because it is a part of the judgment.

On page 87 of the brief, there is a quotation from 2nd Spelling, section 1718, which omits the word "only", making a material change in the sense. This section from Spelling expressly lays down the doctrine that the writ of prohibition will only lie to judicial bodies.

On page 85 of the brief, there is an incorrect quotation from Bailey on Jurisdiction, section 446.

Quotation as it appears in the brief:

"The writ lies where, although the body prohibited may have jurisdiction of the subject, some question arises which is not within the power of the BODY to decide."

Language as it is in 2nd Bailey, Sec. 446:

"The writ lies only where the subordinate tribunal has no jurisdiction at all in the premises, or where, having jurisdiction, some question arises which is not within the power of the COURT to decide."

On page 85 of his brief, the learned counsel misconceives, and incorrectly states, the true effect and meaning of section 452 of 2nd Bailey on Jurisdiction. This author repeatedly lays down the doctrine that the writ can only be used to prohibit judicial action. See 2nd Bailey on Jurisdiction, Sec. 449, *et seq.*

The citations made by the learned counsel from High on Extraordinary Remedies do not follow the language used by that author:

Language used in brief on page 86:

"It is a proceeding wholly collateral to the original proceeding assailed, intended to arrest that proceeding and prevent its further prosecution by a court *or a board or a person* having no jurisdiction of the subject matter in dispute.

"It is the means by which a superior exercises its lawful jurisdiction to restrain an inferior, keep it within the bounds of its jurisdiction. It is a civil proceeding to prevent the further exercise of an unwarranted jurisdiction."

Language used in High, page 715:

"So far from this, it is regarded as wholly collateral to the original proceedings, being intended to arrest that proceeding and to prevent its further prosecution BY A COURT having no jurisdiction of the subject matter in dispute.

"In other words, it is substantially a proceeding between TWO COURTS, a superior and an inferior, and is the means by which the superior tribunal exercises its superintendence over the inferior and keeps it within the limits of its rightful jurisdiction."

On page 87 of the brief, the quotation differs from the language used in section 779 of High.

Language in the brief:	Language used in High, Sec. 779:
"The governing principle in such cases is, that when an inferior *tribunal* proceeds in excess of its lawful jurisdiction, it is chargeable," etc.	"The governing principle in such cases is, that where an inferior COURT proceeds in excess of its lawful jurisdiction, it is chargeable," etc.

On page 87 of the brief, the language used differs from that in section 781 of the 2nd edition of High.

Language used in brief:	Language used in High, Sec. 781:
"The province of the writ is not necessarily confined to cases where the inferior is absolutely devoid of jurisdiction. It extends to cases where the inferior, although rightly entertaining jurisdiction of the subject matter in controversy, exceeds its legitimate powers."	"The province of the writ is not necessarily confined to cases where the subordinate COURT is absolutely devoid of jurisdiction, but it is also extended to cases where such tribunal, although rightly entertaining jurisdiction of the subject matter in controversy, has exceeded its legitimate powers."

We do not, of course, intimate that the learned counsel has purposely misrepresented these authorities, but we do think that there has been a lack of care in quoting from them, and that such material errors appear in the citations of the brief as to justify us in asking the Court to verify them.

We respectfully submit that the well-established doctrine under the Virginia cases, and the case decided by the Supreme Court of the United States, already cited, is that prohibition can only be used between courts. We also submit, that this is the weight of authority in the other States in this Union, and that the only departure from this doctrine in any State has been

to extend the writ to bodies exercising judicial and discretionary duties, although not strictly a court, and in West Virginia to a body which undertakes to exercise judicial functions where it has no power to do so.

All the authorities concur in holding that the writ of prohibition will not lie in a case like the one at bar, where the defendants are clothed merely with ministerial functions, to prevent their performing such ministerial functions.

The learned opposing counsel, on pages 90 to 93, cites a number of cases from Virginia to show that a writ of mandamus has been used repeatedly in Virginia to compel the performance of ministerial acts, from which he seemingly argues, that a writ of prohibition may be used to prohibit acts of the same character.

None of the cases cited from Virginia by the learned counsel are cases of prohibition, but are cases of mandamus. It is plain that those cases have no relevancy whatever to the case at bar.

A writ of mandamus is always used, and can only be used, to enforce the performance of a clear definite ministerial duty concerning which there is no discretion. On the other hand, a writ of prohibition can be used, and is used, only to prevent a court (or possibly in some jurisdictions a body which, although not strictly a court, exercises judicial functions) from exceeding its jurisdiction.

The one writ is appropriate only where the defendant is exercising ministerial duties, and the other writ is appropriate only in the case of a defendant exercising judicial or discretionary duties.

THE WORK OF THE VIRGINIA CONVENTION WAS NOT VOID BECAUSE ITS MEMBERS DID NOT TAKE AN OATH.

It cannot be necessary that we should add to what has already been said in our former brief on this point. There was some division of opinion in the convention upon the question of the propriety of the members taking the oath; but it was decided,

by a majority, that the oath was not only not necessary, but was not proper.

We respectfully submit, that the members of the convention were not officers within the meaning of the Constitution of 1869 as adopted; and that in addition to this it would have been incongruous and inappropriate that members of a convention assembled for the purpose of amending and altering an existing Constitution should take an oath to support the Constitution which they propose to change. This was, in substance, the argument that convinced the majority of the convention that the oath was neither necessary nor proper; and we respectfully submit that the argument is a sound one.

But whether this be correct or not, it is manifest that the failure to take the oath could not affect the validity of their acts. The cases cited by the learned counsel on the other side in no way impugn this principle. Although the failure to take the oath may vacate an office, it has never been held, so far as we are aware, either in the State of Virginia or elsewhere, that such failure will make void the acts of a *de facto* officer holding his office under color.

In addition to this, the Constitution and ordinance of registration have been recognized by all the departments of Virginia as valid, and they have been decided by the Supreme Court of the State to be valid; and neither this Court, nor the lower court, would undertake to declare the Constitution and laws of the State to be void when they were so recognized by the State itself, except upon some ground rendering particular provisions of the Constitution or law invalid by reason of repugnancy to some provision of the Federal Constitution. A Constitution so recognized will certainly not be held invalid because of the failure of the members of the convention to take an oath, even if the taking of such oath was proper. See *Leeper* vs. *Texas*, 139 U. S., 462; *in re* Duncan Id. 449.

The decisions referred to by the learned counsel on the other side as to what constitutes an officer and an office, and what has been considered by the Virginia courts to be the effect of failure to take an oath in vacating an office, have no bearing upon any

question now before the Court, and need no examination at our hands.

Opposing counsel in his brief contends that the registration ordinance and appointment of registrars by the convention were null and void, upon the ground that the convention had no power of independent legislation. We respectfully submit, that neither the court below, nor this Court, has authority to go behind the recognition and determination of the different departments of State government as to what constitutes the law of the State, except upon an allegation that such law is in conflict with some provision of the Constitution of the United States; and this consideration, if there were no other, would deprive the contention of opposing counsel of any legal force. See, *in re* Duncan, 139 U. S., 449; *Leeper* vs. *Texas*, 139 U. S., 452.

In point of fact, however, the acts of the convention in this regard did not constitute independent legislation. On the contrary, the ordinance of registration and appointment of registrars were referred to in the Constitution itself, were necessary for the purpose of putting it in operation by its terms, and formed a necessary part of it.

THE SO-CALLED FUNDAMENTAL CONDITIONS SET FORTH IN THE ACT OF CONGRESS OF JANUARY THE 26, 1870, ADMITTING THE STATE OF VIRGINIA TO REPRESENTATION IN CONGRESS WERE BEYOND THE POWER OF CONGRESS, WERE NEVER ASSENTED TO BY VIRGINIA, AND HAVE ALWAYS BEEN NULL AND VOID.

When we filed our former brief in these cases, we had very little to say upon this point, because we did not believe that opposing counsel would seriously contend that the fundamental conditions in question were binding upon Virginia; but as opposing counsel has devoted so much space in his brief to the discussion of those conditions, and has made several incorrect statements in connection therewith, we think it proper that we should add some further comments upon this subject. We have not the time nor space to go into the matter exhaustively,

but we do not think it necessary that we should do so, for the reason that the question is a settled question in this Court, and because we feel confident that this Court will not find it necessary to pass upon the question at all in these proceedings.

It was not deemed necessary to admit Virginia into the Union; for she was never beyond its pale. The act of January 26,1870, did not ~~suppose~~ purport to do so, but only to admit her again to her constitutional right of representation in the Congress. And it was in that act the conditions in question were inserted.

In the first place, let us see what were the fundamental conditions set forth in said act of January the 26, 1870. They are as follows:

. .

"And provided, further, that the State of Virginia is admitted to representation in Congress as one of the States of the Union upon the following fundamental conditions:

"First. That the Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the Constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State, provided that any alteration of said Constitution prospective in its effects may be made in regard to the time and place of residence of voters.

"Second. It shall never be lawful for said State to deprive any citizen of the United States, on account of his race, color or previous condition of servitude, of the right to hold office under the Constitution and laws of said State, or upon any such ground to require of him any other qualifications for office than such as are required of all other citizens.

"Third. That the Constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the Constitution of said State."

The Congress had in the former year (1869) passed an act prescribing what Virginia should do in order to be entitled to admission to representation in the Senate and House of Representatives. Virginia had, in accordance with the terms of that act, adopted a Constitution, ratified the 14th and 15th Amendments to the Federal Constitution, elected her State officials and Legislature and United States Senators, and members of the House of Representatives, and the Virginia Legislature had thereupon adjourned until the Constitution which had been adopted should be approved by Congress, which the act of 1869 had provided for.

When the act for her admission to representation in Congress was introduced into the House of Representatives conditions which were substantially the same as the conditions above set forth were proposed, but the House of Representatives, ~~by a large majority,~~ voted down all the said conditions, and passed the act to admit Virginia without any conditions. See Congressional Globe, 1869-70, p. 503.)

When the bill went to the Senate the fundamental conditions above set forth were added to the bill. (See Congressional Globe, 1869-70, p. 643.) The said conditions were added by three different votes, which stood 31 to 28, 30 to 29, and 31 to 29. The majority in favor of imposing the conditions embraced eleven Senators from the lately reconstructed Southern States.

It thus appears that a ~~large~~ majority of the Senators from Northern and Western States were opposed to the imposition of such conditions.

When the bill in its amended form went back to the House of Representatives there was very little debate, but the debate that was had demonstrates that the conditions were accepted by the House because it was believed that the conditions were void and of no binding force upon Virginia, and because, if they were not accepted, the admission of Virginia to representation would be indefinitely delayed. (See Congressional Globe, 1869-70, pp. 716-720.)

Opposing counsel quotes at length in his brief from speeches of members of the House and Senate when this bill was under

consideration. We will not imitate his example, but if such speeches could be regarded as authority in this Court, we respectfully submit that the weight of the reasoning, as well as the repute and standing as lawyers, is decidedly on the side of the members of the House and Senate who opposed the validity of the so-called fundamental conditions. Many of the ablest Senators and members of the House who participated in the debate expressed the opinion that the said conditions were beyond the power of Congress, and would be absolutely void.

Most of the instances referred to by opposing counsel of supposed conditions being imposed upon new States admitted into the Union were discussed, and were shown to be either such conditions as would exist under the Federal Constitution, independently of any declaration of Congress on the subject, or were based upon the peculiar conditions such as deed of cession by Virginia of the Northwestern Territory and the ordinance for the government of that territory, and cases of that nature, which depended upon peculiar conditions, not applicable to the case of the Southern States.

It is, however, needless that we should concern ourselves with what was thought of the question by the legislative branch of the government; for such precedents (rarely ever very strong) can have no force as against the repeated decisions and declarations of this Court upon the subject. Opposing counsel, in his brief, cites a number of States which he claims have been subjected to unequal conditions. But none of these cases have stood the test of approval by this Court. Each of those cases would have to be separately examined and determined before it could be relied on as a precedent. And there is neither time nor space here for such examination, and if there were, it would not be profitable. The same enquiry which would be requisite in each of the cases referred to may be more usefully directed to the particular case in hand.

The learned opposing counsel in his brief states that Virginia expressly accepted these fundamental conditions. We respectfully submit that this statement is absolutely groundless. If Virginia did accept the conditions, it is plain she must have

done so by some public act, and we unhesitatingly affirm that there is no such act in question on the part of the State of Virginia; and that she never, either expressly or impliedly, accepted the conditions any further than that her representatives took their seats in Congress after the passage of the Act of Congress in question.

We must suppose that opposing counsel bases this statement upon the speech of Mr. Farnsworth, referred to by him on page 402 of the Congressional Globe of 1869-70, to the effect that the Speaker of the Virginia House of Delegates, at the head of a Legislative Committee, had appeared before the Reconstruction Committee and pledged the faith of Virginia—Mr. Wise says to "keep faith and to carry out every provision," leaving it to be inferred that the pledge was to carry out every provision of the fundamental conditions; whereas the language used by Mr. Farnsworth was to "keep faith and to carry out every provision of *that Constitution*"; quite a different thing.

At that time the Constitution of 1869 had been adopted, but the fundamental conditions had not been passed, and there never was any pledge that Virginia would observe them. There is no evidence that the said committee had any authority to pledge Virginia at all; and no pledge that could be made by them to carry out every provision of the Constitution of 1869 could be more binding than the Constitution itself, which had already been adopted by the people of the State. Indeed, so far from Virginia accepting said "fundamental conditions," immediately after their passage, on the 8th day of February, 1870, the Governor of Virginia sent a message to the Virginia Legislature, in which he used this language: "Notwithstanding 'fundamental conditions' as futile as unnecessary, you are the legislature of a State co-equal in all her rights and prerogatives with any and every other State of the American Union."

An examination of the so-called fundamental conditions will show that they deal with matters which, under the Constitution of the United States, are made the subject of domestic regulation by the States themselves, viz.: the right to vote, the right

to hold office, and the right to legislate concerning public education.

An examination of those fundamental conditions will not only show this, but it will show more than this—viz.: that those fundamental conditions undertake, not only to prescribe what regulations shall prevail as to those purely domestic matters, but in addition to say that the State of Virginia shall at no time in the future make any change in the regulations then established on those subjects, no matter how much such changes may be demanded by the future needs and exigencies of society in the State. Conditions of a similar character were undertaken to be imposed by Congress upon the other Southern States. It would be strange, indeed, if it were possible that Congress could have power thus to emasculate the sovereignty of the States of the Union.

The provision on the subject in the Federal Constitution, which confers upon Congress any power to act at all in the matter, is contained in the fourth clause of the fourth article, declaring:

"The United States shall guarantee to every State in this Union a republican form of government."

In carrying out this article, it may be admitted that Congress has a large discretion as to the choice of methods, and may adopt any method that is necessary and appropriate.

But we respectfully submit, that a condition which makes the regulations, established at any given time by a State unalterable, so far from being a necessary and appropriate means of guaranteeing a republican form of government, is opposed to one of the fundamental principles of republican government, and to the fundamental needs of society. If the State of Virginia should seek to place such an irrevocable and unalterable provision in its own Constitution, it would of course be absolutely futile.

George Mason, who was esteemed a pretty good republican in his day, in framing the Bill of Rights in Virginia, declared:

"When any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable and indefeasible right to reform, alter or abolish it in such manner as shall be judged most conducive to the public weal."

It may further be remarked, that if Congress has power to impose fundamental conditions, such as were attempted to be imposed upon Virginia, that power is without any limits except the will of Congress itself; and under such a power, Congress might absorb all those subjects of domestic legislation which the Federal Constituton has left to the States and denied to the Federal Government. The language of the provision is:

"Shall guarantee to every State in this Union a republican form of government."

What is a State, and what is the Union referred to in the Constitution? The answer is obvious. The State is not defined, but when the Constitution used that term, it evidently meant a political community of the character of the thirteen States which united in framing the Constitution, enjoying the powers and subject to the control of the Federal Government in the manner and to the extent pointed out in the Constitution itself. And it is equally clear by the term "union" was meant the union of States of that nature equal in sovereignty among themselves. In other words, a union between equal States and not between States of unequal power and sovereignty.

When the Constitution, therefore, provides that the United States shall guarantee to each State a republican form of government, it would be plainly contrary to its necessary meaning to suppose that Congress, in the exercise of that power, could alter the nature of the States referred to and of the Union referred to, by emasculating the sovereignty of the State to which the power was applied, and by destroying the integrity of the Union of equal States, which the Constitution evidently contemplated.

The same reasoning which would support the power of Congress to impose such fundamental conditions would equally support its power to change the representation of the State in the House of Representatives and the Senate of the United States. Either class of conditions would be invalid for the plain reason that they would be opposed not only to the whole plan of the Federal Constitution, but also to its express mandates. The Federal Constitution contemplated the continued existence of the States; and when we use the word "State," that word must be taken in the sense in which it was used in the Constitution itself, viz.: a political community possessing all the powers not granted in the Federal Constitution to the Federal Government or denied by that instrument to the States. As was said by this Court in *Texas* vs. *White*, 7 Wallace, 725:

"Not only, therefore, can there be no loss of separate and independent autonomy to the States through their union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."

And it is plain that when the word "State" is used, it means a political community in all of its elements of sovereignty and power, as contemplated by the Constitution, not a mangled and hampered body politic shorn of its essential powers and dignity, and deprived of its sovereign power to legislate upon those subjects which are left by the Federal Constitution within the sphere of its control.

This Court further said in the Slaughter-House cases, 16 Wallace, 82:

"Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and

of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the State and to confer additional power on that of the nation."

The Court in the case just cited refers to the adoption of the post-bellum amendments to the Federal Constitution; but none of those amendments extend the Federal power over the subjects attempted to be embraced within the fundamental conditions embraced in the Act of Congress of January the 26th, 1870. We suppose no one will doubt or deny that the matters embraced within those fundamental conditions are purely matters of domestic concern, and that they are within the exclusive control of the States, and are beyond the power or control of the Federal Government.

If this is so, they are plainly, by the express mandate of the Constitution, reserved to the States by the 10th amendment to the Federal Constitution, which declares:

"The powers not delegated to United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

The contention of opposing counsel that Congress had power to enact these fundamental conditions so as to make them binding upon the State of Virginia, necessarily attributes to Congress the power to violate the Constitution of the United States, and by its act to impose upon the Southern States restrictions or conditions which could only have been imposed upon all the States by a constitutional amendment. The mere statement of this proposition, we submit, furnishes its own answer. It is an axiom, not admitting of question, that the powers of Congress on every subject find their limitations in a lack of granted power, and much more in the express prohibitions of the Constitution where they are applicable.

If another view be taken, that the admission to representation was subject to the conditions imposed, and upon their

breach the State might be deprived of representation in Congress, it may be said that if so abhorrent a suggestion is admissible at all, it has no place in this forum, but must be addressed to the legislative departments of the Federal Government. Upon the main question, this Court has repeatedly declared its views in no uncertain terms.

In *Pollard* v. *Hagan*, 3 Howard, 212, 223, this Court said:

"When Alabama was admitted into the Union, on an equal footing with the original States, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a State or elsewhere, except in the cases in which it is expressly granted."

The Court further said:

"The right of Alabama and every other new State to exercise all the powers of government which belong to and may be exercised by the original States of the Union must be admitted, and remain unquestioned, except so far as they are temporarily deprived of control over the public lands."

The Court further said:

"Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within the limits ,subject to the

common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the Union on an equal footing with the original States, the Constitution, laws, and compact, to the contrary notwithstanding."

The Court further said:

"The declaration, therefore, contained in the compact entered into between them when Alabama was admitted into the Union, 'that all navigable waters within the said State shall forever remain public highways, free to the citizens of said State and of the United States, without any tax, duty, impost, or toll therefor, imposed by the said State,' would be void if inconsistent with the Constitution of the United States."

In *Escanaba Co.* v. *Chicago,* 107 U. S., 678, at page 688, this Court said:

"And although the act of April 18, 1818, c. 67, enabling the people of Illinois Territory to form a Constitution and State government, and the resolution of Congress of Dec. 3, 1818, declaring the admission of the State into the Union, refer to the principles of the ordinance according to which the Constitution was to be formed, its provisions could not control the authority and powers of the State after her admission. Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is "on an equal footing with the original States *in all respects whatever.*" 3 Stat. 536. Equality of constitutional right and power is the

condition of all the States of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Black Bird Creek and Pennsylvania over the Schuylkill River. *Pollard's Lessee* v. *Hagan,* 3 How. 212; *Permoli* v. *First Municipality,* id. 589; *Strader* v. *Graham,* 10 id. 82."

In *Ward* v. *Race Horse,* 163 U. S. 504, this Court examined and reaffirmed the former cases decided by this Court on this subject. *Pollard* v. *Hagan,* 3 How. 212; *Withers* v. *Buckley,* 20 How. 84; *Escanaba Company* v. *Chicago,* 107 U. S. 678; *Cardwell* v. *American Bridge Co.,* 113 U. S. 205 and *Willamette Iron Bridge Co.* v. *Hatch,* 125 U. S. 1. The Court cited with approval what was said in *Withers* v. *Buckley,* 20 How. 84, to the following effect:

"In considering this Act of Congress of March 1, 1817, it is unnecessary to institute any examination or criticism as to its legitimate meaning, or operation, or binding authority, farther than to affirm that it could have no effect to restrict the new State in any of its necessary attributes as an independent sovereign government, nor to inhibit or diminish its perfact equality with the other members of the confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the confederacy, from the language of the Constitution adopted by the States, and from the rule of interpretation pronounced by this Court in the case of *Pollard's Lessee* v. *Hagan,* 3 How. 223."

In the case of *Bolln* v. *Nebraska,* 176 U. S., 83, this Court referred to the case of *Brittle* v. *The People,* 2 Nebraska, 198, on which the opposing counsel relies; and thus the very position for which opposing counsel contends was brought to the attention of this Court. With the question necessarily brought to its attention this Court reiterated its former views:

"But this Court has held in many cases that, whatever be the limitations upon the power of a territorial government, they cease to have any operative force, except as voluntarily adopted after such Territory has become a State of the Union. Upon the admission of a State it becomes entitled to and possesses all the rights of dominion and sovereignty which belonged to the original States, and, in the language of the act of 1867 admitting the State of Nebraska, it stands 'upon an equal footing with the original States in all respects whatsoever.' "

In the same case, this Court further said:

"This Court has also repeatedly held that the first eight amendments to the Constitution applied only to the Federal Courts, and it certainly could never have been intended that these amendments should be imposed upon Nebraska, and thereby a hard and fast rule made for that State that would forever preclude amendments inconsistent with the bill of rights of the Federal Constitution, and which this Court has held to be applicable only to Federal Courts. As we have repeatedly held, the Fourteenth Amendment was not intended to curtail the powers of the State to so amend their laws as to make them conform to the wishes of their citizens, to changed views of administration, or to the exigencies of their social life. It may be readily supposed that the inhabitants of each State understand perfectly their own local needs and interests, and, with the facilities with which the Constitutions of the several States may be amended, it is scarcely possible that any evil which might be occasioned by an improvident amendment would not be readily redressed. Not only did Congress in the act of 1867 declare Nebraska was admitted upon an equal footing with the original States, but the whole Federal system is based upon the fundamental principle of the equality of the States under the Constitution. The idea that one State is debarred, while the others are granted, the privilege of amending their organic laws to conform to the wishes of their inhabitants, is so repugnant to the theory of their equality under the

Constitution, that it cannot be entertained even if Congress had power to make such discrimination. We are, therefore, of opinion that the provision of the Constitution of Nebraska, permitting prosecutions for felony by information, does not conflict with the Fourteenth Amendment to the Constitution of the United States."

We respectfully submit, that these decisions of this Court put this question as rest.

In conclusion, we wish to add a word of comment upon the bitter attack made in the brief of opposing counsel upon Virginia and her representatives. We cannot characterize as they deserve to be the intemperate charges made by opposing counsel upon the members of the Constitutional Convention of Virginia who voted to ordain the Constitution, upon the members of her Legislature, and upon all of her Executive and Judicial officers. The individuals who filled those positions and who are assailed with undiscriminating bitterness embrace men worthy of Virginia in her best days, and they enjoy and deserve the confidence and esteem of their fellow-citizens in the highest degree. We will only say that the imputations against them are groundless and unjust.

W. A. ANDERSON,
Atty.-General of Virginia.

FRANK W. CHRISTIAN,
Counsel for Appellees and Defts. in Error.